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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

IN RE: BLUE CROSS BLUE SHIELD ANTITRUST LITIGATION (MDL No. 2406)	**Master File No. 2:13-CV-20000-RDP** This document relates to all cases.

JOINT STATUS REPORT

In accordance with the Court's April 9 Order (Dkt. No. 353), the parties provide the following joint status report.

1. Positions on the Motions for Leave to Amend

Defendants' Position

Subscriber plaintiffs seek leave to amend the *Stark* and *Shred 360* complaints, and indicate they will be seeking leave to amend in all of their other underlying complaints, in order to assert their claims in those cases against all defendants. *Stark v. Health Care Service Corp. d/b/a Blue Cross and Blue Shield of Illinois*, No. 2:13-cv-1157-RDP, Dkt. No. 10 at 4 & n.1; *Shred 360 LLC v. Blue Cross Blue Shield of South Carolina*, No. 2:13-cv-0003-RDP, Dkt. No. 16 at 4 & n.1.

A number of defendants[1] oppose these proposed amendments as futile against many of the proposed new defendants, because the transferor courts in which the complaints were initially

[1] Blue Cross Blue Shield of Arizona, Excellus, Blue Cross and Blue Shield of Kansas, Blue Cross and Blue Shield of Kansas City, Blue Cross of Idaho Health Service, Inc., Blue Cross and Blue Shield of Nebraska, HealthNow New York, Blue Cross Blue Shield of Mississippi, Blue Cross Blue Shield of North Dakota, Blue Cross Blue Shield of Wyoming, and Triple-S Salud. Capital BlueCross opposes the motion for leave to amend in *Shred 360*.

filed may lack personal jurisdiction and proper venue.[2] The remaining defendants take no position on the proposed amendments.

Under Fed. R. Civ. P. 15, the Court should deny a motion for leave to amend where the amendment would be futile. *See, e.g.*, *Hall v. United Ins. Co. of America*, 367 F.3d 1255, 1262–63 (11th Cir. 2004) ("[A] district court may properly deny leave to amend the complaint under Rule 15(a) when such amendment would be futile.") (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)); *Faulk v. Kilgore*, No. 3:12-CV-00769, 2013 WL 1767818, at *5 (N.D. Ala. Apr. 18, 2013) (denying as futile request to amend complaint to name additional defendant).

Courts routinely deny motions for leave to amend on futility grounds where the court lacks personal jurisdiction over the proposed new defendant or where venue is not proper. *See, e.g.*, *Bancoult v. McNamara*, 214 F.R.D. 5, 6 (D.D.C. 2003) (denying in part motion to amend complaint "[b]ecause the plaintiffs' amendment is . . . futile as to one defendant for lack of personal jurisdiction"); *Gibbs v. United States*, 865 F. Supp. 2d 1127, 1148 (M.D. Fla. 2012) (denying motions to amend complaints because "[a]ll of the proposed complaints contain similar deficiencies including . . . lack of proper venue").

That is the case here. Many defendants whom plaintiffs seek to add to the *Stark* and *Shred 360* complaints transact little or no business in Illinois or South Carolina or the other implicated jurisdictions and districts. The Court should not permit subscriber plaintiffs to amend the *Stark* or *Shred 360* complaints, or any other complaints, to add every single defendant named

[2] In order for an MDL court to exercise personal jurisdiction over a defendant in a transferred case, personal jurisdiction must be proper in the state where the transferor court sits. *In re Amtrak Sunset Ltd. Train Crash in Bayou Canot, Ala. on Sept. 22, 1993*, 923 F. Supp. 1524, 1527 (S.D. Ala. 1996). Similarly, venue must properly lie in the transferor court. *Pritchett v. Paschall Truck Lines, Inc.*, 714 F. Supp. 2d 1171, 1172 (M.D. Ala. 2010); *In re U.S. Office Prods. Co. Sec. Litig.*, 251 F. Supp. 2d 58, 65 (D.D.C. 2003).

in the subscribers' Amended Consolidated Complaint without pleading facts showing that these defendants transact sufficient business to subject them to the jurisdiction of the transferor courts and that venue is proper in those courts. If subscriber plaintiffs are permitted to file the amended complaints without any such facts, many of the newly added defendants will need to evaluate bringing motions to dismiss for lack of personal jurisdiction and improper venue in those cases similar to those motions that are pending in the *AEM* and *Cerven* subscriber cases and the *Conway* provider case.

In addition, these defendants oppose these proposed amendments because they interject procedural complications into this multidistrict proceeding and disrupt the current schedule set by the Court. These proposed amendments will unleash yet another round of motions to dismiss at a time when the parties are focusing on discovery under the Court's schedule. Subscriber plaintiffs have had three years to amend or file new lawsuits, and it is simply too late to begin yet again with new complaints.

Plaintiffs' Position

Subscriber Plaintiffs' motions to amend the *Stark* (Illinois) and *Shred360* (South Carolina) complaints are both timely and proper. They will not disrupt or delay this litigation. In fact, Subscriber Plaintiffs rushed to file these motions ahead of similar planned amendments in other transferred cases so that the new plaintiffs could be added to these complaints without materially affecting the schedule for discovery directed to the named plaintiffs. And by separately filing protective complaints against the Defendants that moved to dismiss for lack of personal jurisdiction and venue in such Defendants' home districts (the "PJ/V Movants"), Subscriber Plaintiffs have assured that all Defendants are properly named in at least one case

presently in the MDL. Accordingly, discovery and other schedules can proceed apace while the Court considers any challenge to jurisdiction in any other specific jurisdiction.

Defendants' stated opposition to the motions is, at best, tepid. Defendants express *no opposition* to the Motions to Amend to the extent they seek leave to substitute plaintiffs. And only a handful of the Defendants oppose the Subscriber Plaintiffs' efforts to clarify the record by conforming the complaints in the underlying, transferred cases to assert the same claims, against the same defendants, as are asserted in the Amended Consolidated Complaint governing the MDL.

Defendants do not even contend that either Illinois or South Carolina lacks jurisdiction over them. Rather, they suggest only that such states "may" lack jurisdiction and that they "will need to evaluate" the possibility of a venue or jurisdiction-based motion to dismiss. Subscriber Plaintiffs respectfully submit that the possibility that a small, unidentified, subset of defendants may at some future date choose to evaluate filing a motion falls woefully short of the standards for denying a motion to amend.

Although admitting that they have not yet fully evaluated the question, a handful of Defendants nonetheless claim that the amendments to conform the underlying complaints to the governing Amended Consolidated Complaint would be "futile." Clearly, however, Illinois and South Carolina can readily exercise personal jurisdiction and venue over all the Individual Blue Plan defendants.

Applying the *Calder* effects test, Illinois courts permit the exercise of personal jurisdiction over out-of-state defendants who engage in a conspiracy that is purposefully directed at Illinois. *See, e.g., Montel Aetnastak, Inc. v. Miessen*, 998 F. Supp. 2d 694, 713 (N.D. Ill. 2014). All the Individual Blue Plan defendants are also subject to Illinois jurisdiction under

Section 12 of the Clayton Act because all are current and past members in good standing of their co-conspirator, co-defendant, the Blue Cross Blue Shield Association ("BCBSA"), which is headquartered in Chicago, Illinois. As alleged in both the Amended Consolidated Complaint and the proposed Amended Complaints to be filed in the transferred cases, the BCBSA was created by and is owned and controlled by the Individual Blue Plan defendants, whose anticompetitive agreements voluntarily entered into with the BCBSA are at the center of this entire litigation. Additionally, yet-to-be conducted merits discovery will confirm the full extent of each Individual Blue Plan's alleged participation in meetings and conference calls conducted at or through the services of the Illinois-based BCBSA, as well as the effects of the defendants' anticompetitive conduct in Illinois, including the exact number of subscribers and the extent of BlueCard services rendered by each defendant in Illinois.

Similarly, South Carolina courts apply the *Calder* effects test to exercise jurisdiction over out-of-state defendants under circumstances analogous to those presented here. *See, e.g., Dash v. Mayweather*, 2010 U.S. Dist. LEXIS 87842; 2010 WL 3420226 (D. S.C. Aug. 25, 2010). Also, as with Alabama, Illinois and North Carolina, merits discovery will demonstrate that, given the mobility of the American populace, many, if not all, the Individual Blue Plan defendants "transact business" within South Carolina sufficient to also satisfy the requirements of the Clayton Act.

Defendants' "futility" arguments are not supported by the cases they cite. In *Faulk*, the plaintiff conceded at summary judgment that she could not state a claim for employment discrimination against two individual employees of the TVA. She proposed to dismiss them and instead sue the Board of Directors of the TVA for employment discrimination. Magistrate Judge Davis properly disallowed the proposed amendment because the plaintiff had not been employed

by the TVA and therefore could not state an employment discrimination claim against its Board. Similarly, *Hall* involved a distinguishable effort to reassert claims the court had already rejected on summary judgment, or which, as a matter of law, did not survive the deceased plaintiff. In *Gibbs*, a *pro se* plaintiff was denied leave to amend a disability benefit claim against the United States that was foreclosed by statute. Leave to amend was denied due to a lack of subject matter, not personal, jurisdiction. The decision in *Bancoult* could hardly be less pertinent. It involved a dispute arising from the Vietnam era in which residents of the Chagos Archipelago in the Indian Ocean were trying to sue, among others, the United States Secretary of Defense over alleged "forced relocation, torture, racial discrimination, cruel, inhuman, and degrading treatment, genocide, intentional infliction of emotional distress, negligence, and trespass" in connection with the creation of a U.S. military base on Diego Garcia island. The court denied leave to add claims against a foreign defendant which had provided an affidavit specifically rebutting limited jurisdiction allegations found in the original (and proposed amended) complaint, and plaintiffs failed to allege any other acts connecting the defendant with the District of Columbia, or any statutory basis for jurisdiction.

More relevant to the present motions is *Hull v. Viega, Inc*., 2014 U.S. Dist. LEXIS 28711 (D. Kan. Mar. 6, 2014), where the court allowed class action plaintiffs to amend in order to substitute in a new plaintiff whose addition to the lawsuit would moot concerns raised by the defendants about dismissal and certification.

The requested amendments are timely and appropriate. No discovery or other schedule would be impacted by allowing the amendments. Although the PJ/V Movants may decide to again challenge personal jurisdiction and venue, that can be addressed through a properly filed motion to dismiss after the amendments are allowed. As addressed above, however, it is those

prospective motions to dismiss, not the Subscriber Plaintiffs' motions to amend, that should be considered "futile."

2. The Effect, if Any, of the Recently Filed and/or Transferred Cases on the Pending Motions to Dismiss

Defendants' Position

Defendants who have filed motions to dismiss for lack of personal jurisdiction and improper venue[3] do not believe that the recently filed and/or transferred subscriber cases filed in their home jurisdictions have any effect on their pending motions. Those motions challenge whether there are sufficient facts to support personal jurisdiction over them in Alabama or North Carolina and whether venue is proper in the Northern District of Alabama or the Western District of North Carolina. New cases filed in their home states where they transact business, even when transferred to this Court as part of the MDL, do not moot or otherwise impact their arguments that there is no personal jurisdiction over them in the cases brought in Alabama or North Carolina and that venue is improper in those jurisdictions.

Consortium and NASCO state that these cases have no effect on their pending motion to dismiss (Dkt. No. 259).

Plaintiffs' Position

Subscriber Plaintiffs have filed six protective complaints on behalf of all named plaintiffs against each of the PJ/V Movants in such Movants' home districts. As the Court notes, five of those actions have been transferred to the MDL, and the sixth is in the transfer process. These "belt & suspenders" complaints were filed to ensure that all defendants have been properly

[3] Blue Cross Blue Shield of Arizona, Capital BlueCross, Excellus, Blue Cross and Blue Shield of Kansas, Blue Cross Blue Shield of Mississippi, HealthNow New York, Blue Cross Blue Shield of North Dakota, Blue Cross of Northeastern Pennsylvania, Triple-Salud, and Blue Cross Blue Shield of Wyoming (Dkt. Nos. 251, 256-58, 280 and 313-14).

named and served in at least one case pending in the MDL, so that discovery could proceed with the involvement of all parties during the pendency of any motions challenging personal jurisdiction or venue in particular jurisdictions. Subscriber Plaintiffs agree that the filing of these protective complaints does not affect the PJ/V Movants' pending motions to dismiss the claims asserted against them in the Alabama and North Carolina actions.

The motions to amend the South Carolina and Illinois complaints are intended to substitute new plaintiffs in those actions and to conform the complaints in those transferred cases to assert the same claims against the same defendants as are asserted in the Amended Consolidated Complaint governing the MDL. Accordingly, Subscriber Plaintiffs agree that the requested amendments to the South Carolina and Illinois complaints do not affect the PJ/V Movants' pending motions to dismiss the claims asserted against them in the Alabama and North Carolina actions.

Consortium and NASCO are not parties in the Subscriber Track litigation, nor do the Amended Complaints to be filed in Illinois and South Carolina name either of them as defendants.

3. Whether Defendants Seek Further Oral Argument on Pending Motions to Dismiss

Defendants' Position

Capital BlueCross, Blue Cross Blue Shield of Mississippi, Blue Cross of Northeastern Pennsylvania and Triple-S Salud request either a teleconference or hearing for additional argument on their motions to dismiss for lack of personal jurisdiction and improper venue (Dkt. Nos. 251, 256-57, 280 and 314).

Blue Cross Blue Shield of Arizona, Excellus, Blue Cross and Blue Shield of Kansas, HealthNow New York, Blue Cross Blue Shield of North Dakota, and Blue Cross Blue Shield of

Wyoming set out their positions fully in their filings (Dkt. Nos. 258 and 313) and do not request oral argument, but are ready to appear if the Court has questions or determines additional argument would be helpful to the Court.

Consortium and NASCO request oral argument on their pending motion to dismiss.

Plaintiffs' Position

Subscriber Plaintiffs do not think further argument is warranted but, of course, are happy to provide the Court with any additional arguments that the Court believes would be helpful to its analysis. Subscriber Plaintiffs find it curious, however, that even a subset of the PJ/V Movants would contend that either the filing of protective complaints against them in their home districts, or the Subscriber Plaintiffs' requested amendments to their Illinois and South Carolina complaints, would justify yet another round of briefing or oral arguments, since the Defendants conceded above that neither of those actions by the Subscriber Plaintiffs has any impact on their pending motions to dismiss the underlying Alabama and North Carolina actions. Because all parties have agreed that neither the filing of the new, protective complaints, nor the requested amendments in Illinois and South Carolina, affect the PJ/V Movants' pending motions to dismiss the Alabama and North Carolina complaints, another round of oral arguments on such motions should not be necessary.

Nor do Subscriber Plaintiffs understand what oral arguments Consortium and NASCO would make that are relevant to such motions since they are not parties in the Subscriber Track litigation.

Provider Plaintiffs do not believe that there is any need to reargue the venue and personal jurisdiction motions or the motion to dismiss filed by NASCO and Consortium that present many

of the same arguments that the Court has rejected. However, the Provider Plaintiffs are prepared to respond to any arguments that Defendants may make on any of the Motions.

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2015, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Kathleen Taylor Sooy
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